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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

HUGH HENDERSON, Individually and by J. WILLARD GRAGG, His Next Friend Appointed by the Court, Petitioner,

vs.

SHELL OIL COMPANY, INC.; NATIONAL SURETY CORPORATION; HARTFORD ACCIDENT AND INDEMNITY COMPANY; W. L. MOUNT; CLARA GRAGG; J. L. GRAGG; RUBY BUNTING; FRANK BUNTING; MYRTLE HENDERSON, Individually and as Executrix of the Estate of M. L. HENDERSON, Deceased; RUTH GARRETT; MULDROW GARRETT; GRACE B. OHEIM, Individually and as Executrix of the Estate of A. J. OHEIM, Deceased; MAY KARSTERER, Individually and as Administratrix of the Estate of SYLVESTER KARSTERER, Respondents.

No. 218

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Texas.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now petitioner, Hugh Henderson, individually and by J. Willard Gragg, his next friend, appointed by the Court, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to the Supreme Court of the State of Texas, which is the highest Court of said State having jurisdiction over this case, and to remove therefrom to this Court for review the record in the case lately pending in said Supreme Court of the State of Texas, entitled Hugh Henderson, etc., Petitioner, v. Shell Oil Company, Inc., a Corporation, et al., Respondents, being cause No. A-1330 on the docket of said Supreme Court of the State of Texas.

The duly certified record is filed herewith under separate cover and includes all of the proceedings herein in the District Court of Clay County, Texas, where a certiorari proceeding was filed to review and set aside the proceedings undertaken in the County Court of Clay County, Texas, and in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, to which petitioner appealed the adverse ruling of the District Court of Clay County, and in the Supreme Court of the State of Texas, which granted a writ of certiorari to review the adverse decision of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Your petitioner represents that he is aggrieved by the judgment of the Supreme Court of the State of Texas entered in said cause, wherein the said Supreme Court of Texas affirmed the judgment of the trial court and of the Court of Civil Appeals, and thereafter, on the 17th day of March, 1948, denied your petitioner's Petition for a Rehearing of said cause and entered a final judgment affirming the judgment of the trial court.

On application of counsel for petitioner this Court for good cause shown has, on, to-wit, June 7, 1948, ordered that the time for filing Petition for Writ of Certiorari in the above-entitled cause be extended to and including August 14, 1948.

Your petitioner states that the matters at issue in said cause are of peculiar gravity and import, in that a citizen and resident of the State of Missouri has been deprived of his property without due process of law by the decision of the Supreme Court of Texas, which in its final opinion has sustained the validity of a State Statute against the claim that it is repugnant to the Federal Constitution and laws enacted pursuant thereto, and is in conflict with the opinions and holdings of this, the Supreme Court of the United States, and with other State and Federal cases, and is con-

trary to the holdings of the other courts of other states in various jurisdictions, and deprives petitioner of his property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

SHORT AND SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner sought in the Courts of Texas to set aside an order of the County Court of Clay County, Texas, made in 1918 purporting to appoint a guardian of his estate in Texas, and to set aside another such order made by the same court in 1939, but which also adjudged him insane, and to set aside the orders of said court pursuant to and by reason of which such guardian purported to lease petitioner's land for the production of oil and gas and to sell one-half of the minerals in petitioner's land in Clay County, Texas, to Respondent, Shell Oil Company, Inc.

Petitioner was a citizen and resident of Missouri (R-2, pp. 33 and 41) and sometime prior to 1918 he inherited the land mentioned (R-2, p. 150).

On November 13, 1918, petitioner's brother, M. L. Henderson, a resident of Texas, filed in the County Court of Clay County, Texas, an application to be appointed guardian of petitioner's estate and alleged therein that petitioner was a resident of Missouri and was not a resident of Texas and was insane (R-2, p. 227; and Plf. Ex. 44, R-3, p. 449). Notice that the application would be heard at the term of the County Court commencing December 2, 1918, was published in a Clay County, Texas, newspaper on November 15, 22, and 29, 1918 (R-2, p. 227; and Plf. Ex. 44, R-3, pp. 450-452). On December 18, 1918, the Court made an order appointing M. L. Henderson guardian of the estate of "Hugh Henderson, Lunatic" (R-2, p. 227; Plf. Ex. 44, R-3, pp. 452-453).

On March 31, 1939, petitioner's brother again filed in the County Court of Clay County, Texas, an application

alleging that petitioner was a resident of Missouri, was not a resident of Texas, was of unsound mind, and prayed to be appointed guardian of petitioner's estate, if it should be found that petitioner was of unsound mind (R-2, p. 227; and Plf. Ex. 44, R-3, p. 587). The Court ordered that notice of the hearing be given in accordance with Article 3310a, Vernon's Revised Civil Statutes, and also that a copy of the application, together with a notice to Hugh Henderson of the date of hearing and requiring him to appear at the time and place thereof be handed to Hugh Henderson personally (R-2, p. 227; Plf. Ex. 44, R-3, p. 588). Notice that the application would be heard on April 17, 1939, was posted on the door of the court house in Clay County, Texas, for ten days (R-2, p. 227; Plf. Ex. 44, R-3, p. 590). A similar notice with a copy of the application was served personally on Hugh Henderson in Pike County, Missouri, on April 5, 1939 (R-2, p. 227; Plf. Ex. 44, R-3, p. 590). On April 17, 1939, the County Court of Clay County, Texas, found petitioner to be of unsound mind and appointed a guardian of his estate (R-2, p. 227; Plf. Ex. 44, R-3, p. 593).

Thereafter the guardian applied for and was granted authority by said Court and pursuant to such authority on May 8, 1939, executed a lease of petitioner's land for oil and gas development and on May 15, 1939, executed a deed and conveyed one-half of the minerals on petitioner's land to Shell Oil Company (R-2, p. 227; and Plf. Ex. 44, R-3, pp. 400, 618 and 648).

No notice other than that mentioned was given in either of the proceedings (R-2, pp. 208-209).

JURISDICTION OF THIS COURT.

The jurisdiction of this court is based upon Section 237 of the Judicial Code, as amended and reformulated by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 937, Title 28, U. S. C. A., sec. 347, providing that it shall be compe-

tent for the Supreme Court by Certiorari to require that there be certified to it for review and determination any cause wherein a final judgment or decree has been rendered by the highest court of a state in which a decision could be had where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States or where any title, right, privilege or immunity is specifically set up or claimed by either party under the Constitution of the United States; and Section 240 of said Judicial Code, which provides that no Writ of Certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree; provided, that for good cause shown such period may be extended 60 days by a Justice of the Supreme Court.

The judgment of the Supreme Court of Texas sought to be reviewed was rendered February 11, 1948 and became final on March 17, 1948, when Petitioner's motion for rehearing was overruled (R-4, pp. 208 and 229). Justice Black of this court, for good cause shown, on June 7, 1948 extended the time for filing Petition for Writ of Certiorari in this cause to and including August 14, 1948.

The pertinent provisions of the statutes of the State of Texas, the validity of which are involved, summarized, are as follows (from Vernon's Revised Civil Statutes of Texas):

Article 4102. The County Court shall appoint guardians of persons of unsound mind and transact all business pertaining to the estates of persons of unsound mind.

Article 4112. The provisions of this title relating to citations and notice shall be held as specific provisions completely within themselves and no other or further publication, citation, or notice in a newspaper than those provided

for herein shall be required. The provisions of any other law to the contrary notwithstanding.

Article 4113. A proceeding for the appointment of a guardian is begun by written application, filed in the County Court of the county having jurisdiction. Any person may make such application and shall state: (1) The name, sex, age and residence of the minor; (2) The estate of such minor, if any, and the property value thereof; and (3) Such facts as show jurisdiction of the court.

Article 4114. Upon the filing of such application, the clerk shall issue a notice which shall state that an application has been filed for the guardianship of the person or estate, or both, as the case may be, of the minor, naming such minor and by whom filed which such notice shall cite all persons interested in the welfare of such minor to appear at the named term of the court and contest such application if they see proper.

Article 4115. Such notice shall be served by posting a copy thereof at the court house door for not less than ten days before the return day thereof.

Article 28 (Rev. Civil Stat. of Tex., now repealed, but in effect in 1918 from laws of Texas 1917, 35th Legislature, p. 391): That whenever by law notice is required to be given of any act or proceeding whether public or private or relating to a judicial, executive or legislative matter, which notice is now authorized by law or by contract to be made by posting notices in one or more public places, such notice shall be given by publication thereof in a newspaper of general circulation, which has been continuously and regularly published for not less than one year in the county in which said act or proceedings is to occur.

Article 4116. A minor over 14 years of age shall be personally served with citation to appear and answer such application or such minor by writing filed with a clerk

may waive issuance of such citation and make a choice of a guardian.

Article 4123. At a regular term of the court, after notice as required by law, the court may proceed to the appointment of a guardian. Before appointing a guardian, the court must be satisfied (1) that the person for whom the guardian is sought to be appointed is a person of unsound mind; (2) that the court has jurisdiction of the case; (3) that the person to be appointed is qualified and a proper person to be guardian; (4) that the rights of person and property are to be protected; (5) that all issues may be determined by the court unless a jury is demanded, but that it shall not be a prerequisite that there has been a jury trial and a verdict of unsound mind and that the remedy is cumulative of that in chapter 12, Title 69, for guardianship of persons of unsound mind and may be resorted to without reference to the later remedy.

Article 4132. When a non-resident minor or person of unsound mind owns property in this state, guardianship of such estate may be granted when it is made to appear that a necessity exists therefor in like manner as if such minor or person of unsound mind resided in this state. The court making such grant of guardianship shall take all such actions and make all such orders in reference to the estate of the ward for maintenance and support or education of the ward out of the provisions of the estate, the same as if the ward resided in this state and had been sent abroad by order of the court for education and travel.

Article 4274. Each provision of this title relating to guardianship of the person and estates of minors shall apply to the guardianship of the person and estates of persons of unsound mind and habitual drunkards insofar as is the same or applicable.

Article 4285. Where a guardian and ward are non-residents, such guardian may file in the county court where

the ward's estate is located a transcript of a court of competent jurisdiction where he and his ward reside showing he has been appointed guardian of the estate of such ward and upon filing such transcript such guardian shall be entitled to receive letters of guardianship in the estate of such minor or persons of unsound mind or habitual drunkards situated in this state.

The opinions of the Supreme Court of Texas and of the Court of Civil Appeals for the Second Supreme Judicial District of Texas are appended hereto, at pages 39 and 46, respectively.

The Supreme Court of Texas held that the foregoing statutes did not require personal service in a proceeding to determine the insanity of a nonresident who owned land in Texas and that such personal service was not required but that service by publication and posting was all that was necessary to comply with the Fourteenth Amendment to the Constitution of the United States.

On April 24, 1943, Petitioner, by next friend, filed in the District Court of Clay County, Texas, a petition for Writ of Certiorari to the County Court of Clay County, Texas (R-1, p. 5), alleging that the proceeding in and orders of the County Court heretofore mentioned "deprived him of his property without due process of law * * * under the constitution * * * of the United States of America * * * particularly under the Fifth and Fourteenth Amendments of said Constitution of the United States of America," and for this reason Petitioner sought to have the order canceled and held for naught (R-1, pp. 21-22). The contention was reiterated by Petitioner in his Third Amended Petition for Writ of Certiorari filed in the District Court of Clay County, Texas, on which the case was tried (R-1, pp. 152-154 and 159-162), but was ignored by the District Court in its judgment (R-1, p. 393).

By assignment of error the same contention was presented to the Court of Civil Appeals of the Second Supreme Judicial District of Texas (R-5, pp. 9-13), but was overruled by that court in its opinion (R-4, p. 1). The contention was again presented to that court by motion for rehearing (R-4, pp. 24-26) and was overruled (R-4, p. 34).

By assignment of error in the Petition for Writ of Error, the same contention was presented to the Supreme Court of Texas (R-4, p. 46), and was ruled adversely to petitioner by that court, which held as follows:

> "Article 4116, R. C. S., provides that a minor, fourteen years of age or over, shall be personally served with citation to appear and answer an application for the appointment of a guardian of him or of his estate. Article 4274 provides that each provision in the title relating to guardianships of persons and estates of minors shall apply to guardianships of persons of unsound mind 'in so far as the same are applicable.' Petitioner takes the position that the Article last cited makes the Article first cited applicable to guardianship proceedings for insane persons. We are not in agreement with this view. Article 4116 is grounded upon the presumption that by the time the minor reaches the age of fourteen years he will have acquired some discretion and be capable of making a choice of guardian. No such presumption obtains in the case of a person of unsound mind. His discretion does not grow with the years. Article 4116 is, therefore, not applicable to him.
>
> "It was held in Storey v. Storey (Civ. App.), 105 S. W. (2d) 370 (writ of error refused), that personal service of citation on a person of unsound mind was ineffective to confer jurisdiction on a county court to appoint a guardian for such a person, and that notice by posting provided by Articles 4114 and 4115 was mandatory. That requirement was met in this case.

Prior to 1941 (47th Leg., p. 867, ch. 541) there was no statute in Texas authorizing nonresident notice in a guardianship proceeding for a person of unsound mind. Our conclusion is that the Court of Civil Appeals correctly decided that the County Court of Clay County was acting within its jurisdiction in making the appointment of M. L. Henderson as guardian of the estate of Hugh Henderson in 1939.

"It is our further view that due process within the meaning of the Fourteenth Amendment to the Constitution of the United States was observed in the proceeding. Jones v. Prairie Oil Co., 273 U. S. 195; McKinley v. Salter (Civ. App.), 136 S. W. 2d 615 (writ dismissed, correct judgment). Such a proceeding is one in rem or quasi in rem. McCormick v. Blaine, 178 N. E. 195, 77 A. L. R. 1215; Re Sall, 59 Wash. 539, 140 Am. St. Rep. 885; Wallace v. Tinney (Iowa), 122 N. W. 936. In a proceeding of that nature the court may acquire jurisdiction by means of substituted or constructive service. Pennoyer v. Neff, 95 U. S. 714; Re Sall, supra; Case note 77 A. L. R. 1227. A contrary holding would have the effect of depriving the courts of this state of control over lands situated within its borders" (R-4, p. 203).

The contention was reasserted by motion for rehearing in the Supreme Court of Texas (R-4, p. 222), and was overruled (R-4, p. 229).

This Court has not previously determined the kind of service required in a proceeding to determine the sanity of a person and particularly where the person is a nonresident of the state.

The cases believed to sustain the jurisdiction of this court are the following:

Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565;
Minnesota v. Probate Court, 309 U. S. 271;

Boston & Maine v. Armburg, 285 U. S. 232, 52 S. Ct. 336, 76 L. Ed. 729;
Union Bank v. Phelps, 288 U. S. 181, 53 S. Ct. 321, 77 L. Ed. 687, 83 A. L. R. 1438;
Griffin v. Griffin, 66 S. Ct. 556, 327 U. S. 220;
International Shoe Co. v. State of Washington, 66 S. Ct. 154, 326 U. S. 310;
Wuchter v. Puzzutti, 276 U. S. 13, 48 S. Ct. 259;
Hess v. Pawloski, 47 S. Ct. 632, 274 U. S. 352;
McDonald v. Maybee, 243 U. S. 90, 37 S. Ct. 343, 61 L. Ed. 608;
Jacob v. Roberts, 223 U. S. 261, 32 S. Ct. 303, 56 L. Ed. 429.

QUESTIONS PRESENTED.

The questions presented are:

A. Whether the State of Texas may, consistently with the Fourteenth Amendment of the Constitution of the United States, determine the sanity of a citizen and resident of another state who owns property in Texas, and upon a finding that such person is insane, appoint a guardian of the estate of such person and authorize such guardian to dispose of the property of such nonresident in the State of Texas; and

B. Whether, if the State of Texas has such power as mentioned in the preceding paragraph, it may be exercised, consistently with the Fourteenth Amendment of the Constitution of the United States when the statutes of the State of Texas do not provide for or require personal service of process on the alleged insane person and when such notice was not in fact given.

C. If the State of Texas has such power as mentioned in paragraph A and personal service is not required for the exercise thereof, whether service by publication or posting of notices in Texas is sufficient to comply with the Fourteenth Amendment of the Constitution of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Certiorari should be granted for the following reasons:

First: The Supreme Court of the State of Texas has denied a resident and citizen of Missouri due process of law by holding that a citizen and resident of Missouri can be served by publication and posting in Texas alone in a proceeding to determine his sanity.

Second: In the interest of uniformity of interpretation between this Court and the said Supreme Court of the State of Texas and because of substantial conflict of decision on a vital and controlling matter of law involved in this cause in regard to the construction and application of the Constitution of the United States and its amendments.

Third: Because there is a conflict in decision between the said Supreme Court of the State of Texas and the decisions of the various Federal Circuit Courts of Appeal and the decisions of the various Supreme Courts of the several states of the Union on a controlling and decisive question of law involved in this case in regard to the construction and application of the Constitution of the United States and the Fourteenth Amendment thereof.

Fourth: Because the decision of the Supreme Court of the State of Texas upholds the validity of a state statute purportedly authorizing service by publication to determine the sanity of a resident and citizen of a foreign state, in violation of the due process clause of the United States Constitution and its amendments.

Fifth: This court has not heretofore determined the question of due process in sanity proceedings as in this case and the Supreme Court of Texas has decided an important Federal question in a way not in accord with

applicable decisions of this Court, in that the Supreme Court of Texas rules that the jurisdiction of the state over land in the state authorizes the determination of the mental capacity of the non-resident owner of such land without personal service, and thus permits a personal judgment upon constructive service, contrary to Pennoyer v. Neff, 95 U. S. 714.

Sixth: This erroneous ruling may be extended and applied to the determination of other questions affecting the right and capacity to transfer land such as the validity of a marriage, or the legitimacy of children.

Seventh: If the decision of the Supreme Court of Texas be allowed to stand the sanity of a non-resident landowner may be determined upon published or posted notice and will create serious questions of the full faith and credit to be given a judgment regarding the sanity of such a non-resident property owner.

Eighth: Your petitioner further shows that the Supreme Court of Texas had the above points brought to its attention, but disregarded them, and the same were again called to the attention of the Texas Supreme Court in your Petitioner's Motion for Rehearing, which said Motion said Court overruled.

Wherefore, your Petitioner prays that a Writ of Certiorari be issued to the Supreme Court of Texas commanding said court to certify and send to this court a full and complete transcript of the record and the proceedings of the Supreme Court of Texas in the case on its Docket No. A-1330, entitled Hugh Henderson, through J. Willard Gragg, his next friend, Petitioner, v. Shell Oil Company, Inc., et al., Respondents, to the end that the case may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said Supreme Court of Texas be reversed, and that Peti-

tioner have such other relief as to this court may seem appropriate.

Respectfully submitted,

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No.....

BRIEF AND ARGUMENT

In Support of Petition for Writ of Certiorari.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Texas which is reported in ... Tex. ..., 208 S. W. 2nd 863, and the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas which is reported in 202 S. W. 2d 492, are appended hereto.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this court is invoked is contained in the Petition for Writ of Certiorari, and is incorporated here by reference.

STATEMENT OF THE CASE.

The statement of the case in the Petition for Writ of Certiorari, ante, is adopted here by reference.

SPECIFICATION OF ERRORS.

A. The Supreme Court of Texas erred in holding that the State of Texas had the right, consistently with the Fourteenth Amendment of the Constitution of the United States, to inquire into and determine the sanity of a nonresident of the State of Texas.

B. The Supreme Court of Texas erred in holding that the State of Texas could consistently with the Fourteenth Amendment of the Constitution of the United States, inquire into and determine the sanity of a nonresident of the state who owned property within the state upon published or posted notice and without the seizure of property or personal service of process.

C. The Supreme Court of Texas erred in holding that the statutes of the State of Texas do not violate the Fourteenth Amendment of the Constitution of the United States by authorizing an inquiry into and determination of the sanity of a nonresident property owner without personal service of process.

D. The Supreme Court of Texas erred in holding that the proceedings in the County Court of Clay County, Texas, to determine Petitioner's sanity and upon a finding that Petitioner was insane to appoint a guardian for him were proceedings in rem maintainable upon constructive service and not proceedings in personam, requiring personal service of process in order to comply with the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

The Texas Court's holding is that a Texas County Court **merely upon a notice published in a local paper or posted upon the courthouse door** may proceed to adjudge insane any owner of property located in the county, **even a resident of another state.**

To reach such conclusion the Court holds that **Article 4116 requiring personal service of citation** does not apply to a proceeding based upon allegations of **insanity,** as such proceeding is in rem.

The question of whether or not the Texas Legislature **could** have authorized service by non-resident **notice,** service by mail, or other substituted service, is not involved, because the Legislature **had not** authorized any such service.

The Texas Supreme Court took the position that Article 4116 requiring personal service of citation did not apply to a proceeding based on allegations of **insanity,** but only to those applications based on **minority.** It asserts that the posting required by Article 4115 is the **only notice** "required by law" in order to adjudicate a man insane and divest him of control of his property, whether he be a resident of Texas or Missouri. If this basic premise is invalid, then the whole argument fails.

The opinion below cites Jones v. Prairie Oil & Gas Co., 273 U. S. 195, 47 S. Ct. 338, as authority for the proposition that due process within the meaning of the Fourteenth Amendment to the Constitution of the United States was observed in this proceeding. But that case involved the appointment of a guardian of an admitted minor, who and whose property were all within the state of Oklahoma, and notice was in fact given by posting and by mail to the

minor, and others having care of the minor, all in compliance with the order of the Court in accordance with the statute. That case did not involve the rights of a non-resident adult.

In the same connection the court also cites, but does not analyze, Pennoyer v. Neff. This case is directly contrary to the position taken by the court below.

This court in **Pennoyer v. Neff, 95 U. S. 714**, announced the rules which govern this case, but which rules the Supreme Court of Texas has not followed. The facts of this case and the facts in Pennoyer v. Neff are substantially the same. In Pennoyer v. Neff an Oregon statute provided for service by publication in suits against non-residents who owned property in Oregon. Neff was not a resident of Oregon but owned property there. He was sued by one Mitchell for an alleged debt and service was obtained on him by publication, **but his Oregon property was not seized before judgment in the case.** After a judgment against Neff, his Oregon property was seized and sold on execution to Pennoyer. This court held the judgment and the consequent sale to be void. So in this case, Henderson owned land in Texas, but was not a resident of Texas. Service in the guardianship proceedings was only by publication and posting. **None of his property was seized before a guardian was purportedly appointed.** The guardianship proceeding in Texas was no more against land than the suit against Neff in Oregon. The guardianship proceeding was against Hugh Henderson. Seizure of his land was an aftermath of the finding that he was of unsound mind and followed the appointment of a guardian based on the finding of unsound mind. The Texas statute did not authorize the appointment of a guardian at all until after it had been established that Hugh Henderson was of unsound mind. Although both of those things could (in a proper case) be done in the

same proceeding. Article 4123, Vernon's Revised Civil Statutes of Texas, provided in part that:

> "* * * after notice as required by law, the court may proceed to the appointment of a guardian. Before appointing a guardian, the court must be satisfied (1) that the person for whom a guardian is sought is * * * a person of unsound mind * * *."

The determination of Hugh Henderson's sanity was as much an object of each of the guardianship proceedings as was the ultimate control of Hugh Henderson's property by a guardian. A finding that Hugh Henderson was of unsound mind was the first and primary purpose of each of those proceedings, for without it the court had no authority to appoint a guardian. This court has long ago recognized that "merely giving a name to an action as concerning the thing rather than personal rights in it" will not justify depriving a person of his property without due process of law. **Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 39.**

The Texas courts may not satisfy the requirements of the Fourteenth Amendment of the Constitution of the United States by calling the guardianship proceedings "in rem" or "quasi in rem" or by saying that their primary object was the control of Texas property and not the determination of Hugh Henderson's sanity. The decision of the Supreme Court of Texas is directly contrary to the decision in Pennoyer v. Neff. The Supreme Court of Texas in this case holds directly contrary thereto, and holds that ownership of land in a state and service by publication, but without seizure of property, constitutes a valid basis for a personal judgment. Since Pennoyer v. Neff, it cannot be the rule in any state consistently with the Fourteenth Amendment of the Constitution of the United States.

Prior to the opinion herein the courts in Texas had held with Pennoyer v. Neff. Redmon v. Leach, 130 S. W. (2d) 873 (Civ. App., Dallas), is factually the same as this case. It was expressly approved by the Supreme Court of Texas, which dismissed a Writ of Error "correct judgment." We trust this Court will pardon a rather lengthy reference to that case, as it so fully presents the question of due process under the applicable Texas law. In that case the Dallas Court of Civil Appeals held:

> "We think it obvious that, before the power to appoint a guardian of property in this state, belonging to a non-resident minor or person of unsound mind, could be exercised, necessarily the court would have to first determine the status of such person, that is, whether of minority or unsoundness of mind, as the case might be; otherwise, the power to appoint would be wholly lacking. So, we are plainly confronted with the question, whether the court below had the power to determine that Beatrice Redmon, a citizen of and domiciled in the State of Oklahoma, was a person of unsound mind * * *.
>
> "We conclude, therefore, that in view of the doctrine announced in the authorities cited, where, as in the instant case, the appointment of a guardian involves the necessity for the court making the appointment, to first adjudicate and determine the status, whether of minority or of unsoundness of mind, of a non-resident, for whose estate a guardian is sought, the court not only is without jurisdiction, but that, any attempt of the legislature to confer such jurisdiction would be ineffective; to say otherwise would be to ignore the doctrine announced by Judge Taney, and other authorities cited, to the effect that, 'Every state has an undoubted right to determine the status, or domestic and social condition, of the persons domiciled within its territory.' But, aside from the want

of power in the court below, to appoint a guardian of the estate of the non-resident, based upon an adjudication as to her status, we are of opinion that, the court was without jurisdiction, for the want of personal service of citation upon the non-resident * * *.

"In Bearden v. Texas Company, 60 S. W. 2d 1031, 1034, construing these statutes together, the Supreme Court said: 'It appears that when Articles 4114, 4115 and 4116, are read in conjunction with Article 4274, supra, the method of issuing and serving notice in guardianship proceedings for the appointment of a guardian for persons of non compos mentis are fully defined. In other words, Article 4274 requires that notice and citation shall be issued in cases involving insanity in the same manner as in cases involving minors.' It follows, therefore, that, as Beatrice Redmon was over 14 years of age, she should have been served personally with citation. But it may be said that, being of unsound mind, personal service of citation could serve no useful purpose. It must be borne in mind that, she was presumed to be sane, as the only imputation against her sanity was the unsupported allegation. The rule is that, until overcome by proof, the presumption will be indulged that, a person is mentally sound, possesses ordinary intelligence, judgment and discretion, and is competent to transact ordinary business. Therefore, in the absence of personal service, we conclude that the court below was without jurisdiction and that its order appointing the guardian, and all proceedings had thereunder, are void."

Other states and the District of Columbia take the view that a proceeding to determine a person's sanity and for the appointment of a guardian, if the person is found to be insane, is in personam and requires personal service on the alleged insane person.

In **Raher v. Raher, 150 Ia. 511, 129 N. W. 94,** it appears:

> "Appeal by plaintiff from a judgment of the District Court for Iowa County in defendants' favor in an action brought to set aside a judgment adjudging plaintiff to be of unsound mind, and appointing defendant Mullin guardian over his person and property.
>
> • • • • • • •
>
> "The special proceeding in which this plaintiff was adjudged to be of unsound mind and Mullin was appointed guardian was instituted in the District Court of Iowa County, and personal service was made upon this plaintiff while he was in fact within the limits of the state of South Dakota. The petition in such proceeding did not allege the place of residence of the defendant therein, but it is now stipulated that his legal residence was in Iowa County . . ."

After discussing state statutes, the Court continues:

> ". . . It is therefore quite apparent that what the legislature in adopting the Civil Code of 1860 attempted to do was to authorize some kind of a judgment alike against residents and non-residents on personal service out of the state, without the preliminary seizure of any property which would give the court jurisdiction in rem, and the question we have to determine is whether such a judgment is of any validity within the state.
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> • • • • • • •
>
> "It may be conceded that expressions of opinion are found in decided cases and in textbooks justifying the view evidently entertained by the legislature, as above indicated. This view is contrary to the general proposition that the laws of a state, especially a state of this Union, are territorial rather than personal in their force and application. Romano v. Capital City

Brick & Pipe Co., 125 Iowa 591, 68 L. R. A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, 2 A. & E. Ann. Cas. 678. And it violated the provision of our own Constitution and of the 14th Amendment of the Federal Constitution, that no person shall be deprived of his property without the process of law.

* * * * * * *

"After examining all the cases which we have been able to find bearing directly or remotely on the question, we reach the conclusion that no court of last resort in any of the states of the Union has upheld such a judgment as against an attack based on the want of authority of the state to authorize such a judgment, or the want of authority of the court to render it . . ."

The Court then discusses numerous cases and concludes:

". . . We have now no hesitation, however, in announcing our conclusion that a state cannot, by providing for personal service outside of its territorial limits, authorize its courts to render personal judgment against a defendant thus served. **The judgment in the proceedings for the appointment of a guardian of the property of this plaintiff, predicated upon service of notice upon him in South Dakota, was therefore void, and the trial court erred in not so holding.**"

In **Grinbaum v. Superior Court, 192 Cal. 566, 221 P. 635, l. c. 646,** it is said:

"The strictitude of our statutory requirements in that regard is best illustrated by the provisions of Sec. 1763 of the Code of Civil Procedure relating to the guardianship over the person or property of alleged insane or incompetent persons who are within the state which require personal service and attend-

ance of the alleged insane or incompetent person if possible. That a similar strictitude cannot be practicably enforced in the case of alleged insane or incompetent persons who reside or are absent from the state lies in the nature of things but does not in any degree diminish the importance of giving the notice required by Sec. 1793 of the Code of Civil Procedure. Said notice requirement rests upon the fundamental doctrine that no person can be deprived of life, liberty or property without due process of law."

The Supreme Court of California has followed this earlier case in two very late cases and held that an insanity hearing based on foreign service and on publication service are insufficient and the entire proceedings are null and void because of lack of personal service.

In re: Allie Walters Sacks (Cal.), 190 P. (2d) 602,
and
Sacks v. Superior Court, 79 Cal. App. (2d) .., 180 P. 2d 922.

The Court of Appeals for the District of Columbia in **Cooper v. Burton, 127 Fed. (2d) 741,** said:

"In October, 1940, P. Gordon Cooper and Albin Cooper (appellants), sons of Emma K. Cooper, filed a petition in the District Court to have the mental competency of Mrs. Cooper determined, and, upon a finding that she was insane, to have appointed a committee of her property and estate. The petition prayed that during the pendency of the cause a conservator of the property be appointed.

"Mrs. Cooper is a widow eighty years of age. From 1914 to 1934 she resided with her sons in Washington, D. C. In 1932 she is alleged to have become insane, and in 1934 she was taken to the Christian Sanatorium, Bergen County, New Jersey, for care and treatment.

She has remained there ever since and is there now. The bulk of her estate consists of an inheritance from her sister, who resided in New York. In April, 1940, the Chancery Court of New Jersey adjudicated Mrs. Cooper to be of unsound mind, and the Orphans' Court of Bergen County, New Jersey, thereupon appointed Lloyd L. Schroeder (appellee) guardian and committee of her estate.

"After the filing of the petition in this case, a subpoena issued and was returned by the marshal 'not to be found.' Thereafter the district court, at the instance of appellants, ordered substituted service by publication. Copies were mailed to Mrs. Cooper and to the superintendent of the sanatorium in New Jersey. Following this, the New Jersey guardian, appearing specially, moved the court to vacate the order of publication and dismiss the petition because of lack of jurisdiction. . . .

". . . We have been referred to no statute which empowers the United States District Court for the District of Columbia to adjudicate the mental condition of a lunatic in New Jersey because she formerly lived in the District. Doubtless it is true that the courts of the District have power to grant protection to property of insane persons, wherever they may be at a particular time, if the property itself is located in the District of Columbia, but protection of property is not the object of this petition. Appellants are not interested in obtaining the appointment of a receiver or custodian of the small amount of Mrs. Cooper's property in the District of Columbia. They are seeking an adjudication of insanity and the appointment of a committee for the purpose of controlling properties located in New York, and this character of relief the courts of the District may not grant in the absence of personal service in the District of Columbia.

"In this view, we need say nothing on the subject of the full faith and credit rule as applicable to the New Jersey decree.

"Affirmed.

"On petition for Rehearing and Clarification of Opinion.

"Per Curiam.

"Appellants have asked for a rehearing or a clarification of the opinion filed March 23, 1942. The particular paragraph to which our attention is drawn, and which we are asked to clarify, is as follows: 'Doubtless it is true that the courts of the district have power to grant protection to property of insane persons, wherever they may be at a particular time, if the property itself is located in the District of Columbia, but protection of property is not the object of this petition. Appellants are not interested in obtaining the appointment of a receiver or custodian of the small amount of Mrs. Cooper's property in the District of Columbia. They are seeking an adjudication of insanity and the appointment of a committee for the purpose of controlling properties located in New York, and this character of relief the courts of the district may not grant in the absence of personal service in the District of Columbia.'

"Appellants state that it is incorrect to say that they are not interested in obtaining the appointment of a receiver or custodian of Mrs. Cooper's property in the District of Columbia, and insist that they are. If this is true, nothing in the opinion forecloses any right they may have in that respect. We did not decide, nor did appellants ask us to decide, whether a receiver or custodian to care for property within the District could be appointed without an adjudication of insanity. The petition below prayed that a 'hearing be had to determine the mental competency of Emma K.

Cooper and should she be found to be non compos mentis that (appellants) be appointed domiciliary committee of the estate of said Emma K. Cooper.' **Our opinion holds that a general or domiciliary committee cannot be appointed without an adjudication of insanity** and that **there cannot be an adjudication of insanity in the absence of personal jurisdiction over the alleged insane person.**

"Rehearing denied."

The Federal Circuit Court of Appeals for the Tenth Circuit, in the case of **McElroy v. Pegg, 167 Fed. (2d) 668,** held that where notice was not personally served on an alleged incompetent as required by state statute, the order appointing a guardian was **void.** The court reviews the facts and at page 670 says:

"In the case of **In re Mize's Guardianship, 193 Okl. 164, 142 P. 2d 116,** an order had been made appointing a guardian for Elnora Mize, an alleged incompetent. The record did not disclose that **personal service was made** upon Elnora Mize. She personally appeared at the hearing on the petition for the appointment of the guardian and had joined in such petition. The **court held** that Sec. 851, supra, **required** that **notice** of the time and place of the hearing **shall be served personally upon** the alleged incompetent not less than five days before the time appointed for the hearing, **that failure to personally serve notice was not cured by the personal appearance of the alleged incompetent** at the hearing, and that the order of appointment was void. In **Martin v. O'Reilly, 81 Okl. 261, 200 P. 687,** the court held that the requirement that notice of the hearing on the application for the appointment of a guardian be **personally served** upon the alleged incompetent was **jurisdictional,** and that an order appointing a guardian, where no personal service was made upon

the alleged incompetent, was **void and subject to collateral attack.** In **Colby v. Jacobs, 179 Okl. 170, 64 P. 2d 881,** the court held that the requirement that notice of the hearing on the application be **personally served** upon the alleged incompetent was **jurisdictional** and, **without the service of such notice,** the **court acquired no jurisdiction** to make an adjudication of incompetency or to appoint a guardian.

"Here, there was was **no showing of personal service** upon Harjo and it was a reasonable inference from the recitals in the order of appointment that notice was not personally served upon Harjo. Moreover, the order of appointment did not find or adjudge the statutory grounds for the appointment of the guardian.

"**It follows that the order appointing a guardian for Harjo was void** and created no presumption of the incompetency of Harjo." (Emphasis ours.)

In **Martin v. White, 146 Fed. 461,** the Ninth Circuit Court of Appeals said:

"Petition for guardianship in Alaska alleged H. M. Badger a legal resident of Alaska, had left Alaska; that he was insane and had property in Alaska. Citation was published and guardian appointed. Appointment was held void on collateral attack.

"Code Alaska, Sec. 911, declares that when any person likely to be put under guardianship shall reside without the district, and shall have any estate therein, any friend or anyone interested in his estate may apply to the commissioner of any precinct in which any such estate may be, and that a guardian may be appointed by the commissioner after notice. Sec. 912 declares that every guardian appointed under the provisions of the preceding section shall have the same powers and duties with respect to any estate of the ward that may be found within the district, etc, as are

given to any other guardian duly appointed, etc. **Held**, that such sections were only applicable to guardians appointed for persons who reside without the district, having estates within the district where the proceedings are instituted.

"Code Alaska, Sec. 896, declaring that when the relatives or friends of any insane person shall apply to have a guardian appointed for him, the commissioner shall cause notice to be given to the supposed insane person of the time and place of the hearing, etc., contemplates the personal service of such notice on the person affected thereby."

And some states hold actual residence also to be required.

In **Morrissey v. Rodgers, 137 Kan. 626, 21 P. 2nd 359**, the Supreme Court of Kansas says:

"This is a proceeding in mandamus brought in the district court of Mitchell County, Kan., by a resident of Nebraska, as guardian of an incompetent person, appointed as such by the county court of Lancaster County, Neb., against the probate judge of Mitchell County, Kan., to compel him to issue a certificate of guardianship to the plaintiff and to direct the payment to him of the proceeds of two estates administered in the probate court of Mitchell County, in which the incompetent had already been found to be the sole heir.

"An alternative writ was issued, and a motion of the probate judge to quash it was overruled. Defendant then filed an answer admitting the filing in the probate court of an authenticated copy of the appointment and qualification of the plaintiff by the court of Lancaster County, Neb., and an application for a certificate of guardianship from the probate

court, and for authority to receive the money and property belonging to the incompetent from these estates, but denying that the incompetent, George Eberle, was or ever has been a resident of Nebraska, and the answer alleged he has continuously for the past fifty-three years been a resident of Mitchell County, Kan., and further that, because of his incompetency for more than a year past, he had been unable mentally to make or effect a legal change of residence. The plaintiff moved for judgment on the pleadings. Pending the consideration of this motion, the defendant offered evidence to show that the incompetent, George Eberle, was not a resident of Nebraska, but was and had been for many years past a resident of Mitchell County, Kansas. . . ."

And in **Beeler v. Beezley, 126 Kan. 268, 267 Pac. 1112,** it also appears:

"The action was one of prohibition to restrain the probate judge of Edwards County from conducting a proceeding to determine the mental competency of a person not within the county. The relief prayed for was granted, and the probate judge appeals.

"Gracia Beeler, daughter of H. B. Beeler, filed an information in the probate court of Edwards County, alleging that H. B. Beeler was a resident of Edwards County and a person of unsound mind, who was incapable of managing his affairs; that he was in an institution in Kansas City, Mo., for treatment of mental diseases, and was there undergoing treatment for his malady; that he was incapable of caring for himself; and that he had real and personal property in Edwards and Reno Counties which ought to be placed in the custody and under the control of a guardian. The Court issued a notice to Beeler of a

hearing on the information, appointed Gracia Beeler to serve the notice, and the notice was served on Beeler in Missouri. On the day designated for the hearing, an attorney for Beeler appeared specially, and challenged jurisdiction of the court. The challenge was overruled, and a jury was called and sworn to inquire respecting Beeler's sanity. Before the inquiry was concluded an alternative writ of prohibition was served on the probate judge. The probate judge answered, a demurrer to the answer was sustained, and a writ prohibiting the probate judge from proceeding further was issued."

"The brief for the probate judge discusses the nature of the proceeding, whether civil or criminal, adversary or parental, and the subjects of notice and service of notice. We do not get to any of those matters, because **the information disclosed that Beeler was in Missouri, and the probate court had no jurisdiction to entertain it.** There is no jurisdiction to make an initial inquiry into the sanity of a person outside the county in a guardianship proceeding, and the same is true of proceedings for institutional restraint."

And in **Hansell v. Hansell, 44 La. A. 475, 10 S. 941,** the Louisiana Court says:

"Plaintiffs Emma W. Hansell et al., being the owners of an undivided twenty-nine thirtieths of certain improved real estate in the First Ward of the City of New Orleans, on Magazine and Common Streets, bring this suit for a partition against Henry H. Hansell, the owner of the remaining undivided one-thirtieth interest. The petition alleges the ownership, and that Henry H. Hansell is a notoriously insane person, who has never been interdicted, and for whom

no curator has ever been appointed; that he is confined in an asylum in the city of Philadelphia, Pa., and it is necessary that a special curator and curator ad hoc be appointed to represent him, and defend the suit; that F. F. Hansell, of the full age of majority, is the brother of H. H. Hansell, and is the person who, under the law, would be appointed curator to said H. H. Hansell in case he were to be interdicted. The prayer is that said F. F. Hansell be appointed special curator and curator ad hoc to represent said H. H. Hansell; that he be notified of his appointment, and duly cited to answer the petition; and that there be judgment ordering the property sold at public auction, as provided by law. In accordance with the prayer of the petition, F. F. Hansell was appointed special curator and curator ad hoc of Henry H. Hansell, and was duly notified and served with citation to answer in due course. The judgment was regularly rendered, in accordance with the prayer of the petition, ordering a sale of the property at public auction. The sale was made, and the properties were adjudicated, one to R. Maitre and the other to R. F. W. Bachman, who refused to take title for various reasons stated in their answer to the rule taken by plaintiffs on them to compel them to comply with the adjudication. The principal objection made by the adjudicatees, and the one upon which they insist most strongly, is that until H. H. Hansell has been interdicted, and a curator appointed for him, as provided by law, he cannot be properly brought into court, and a binding judgment rendered against him; (2) they object on the ground that F. F. Hansell has never taken oath as special curator, and therefore H. H. Hansell was not properly represented, and the judgment rendered against him not a valid and binding one.

"It is alleged in the petition that H. H. Hansell is notoriously insane, and this averment is proved by the testimony. He has been in this condition for three years, and during that time has been confined in an insane asylum in the city of Philadelphia. His domicile is in that city. The courts in this state have no jurisdiction of his person, and can render no decree affecting his personal status, and interdict him. The courts of his domicile alone have jurisdiction to ascertain his mental condition, and to render the necessary decree relieving him of the control both of his person and estate. No facts alleged and no evidence received by the courts here can place a person domiciled in a foreign jurisdiction among the class of persons incapable of managing their persons and estates. . . ."

In **McMullin v. Commonwealth, etc., 261 Pa. 574, 104 Atlantic 760**, Harry Kern, a resident of New Jersey, was adjudged insane in that state. Afterward a Pennsylvania court appointed guardian for his property in Pennsylvania. The guardian appointed in New Jersey sought an order of the Pennsylvania court permitting the removal to New Jersey of property in Pennsylvania belonging to the ward under the provisions of the Pennsylvania statute authorizing a non-resident guardian of a non-resident ward to remove property. The lower court denied the petition and the Supreme Court of Pennsylvania said:

"We simply remark, without further comment, that the learned court was here under misapprehension as to its proper functions in this particular case; the lunatic here was not its ward; it had not adjudged him a lunatic, **and could not have done so, had it attempted to, inasmuch as it had no jurisdiction over him, he being resident of another state.** He was the ward of a court in another state, and that court alone had juris-

diction over his person. It was by virtue of the adjudication of that court that he was legally adjudged a lunatic, and it was upon the certification of that court to the courts of this state that the latter acquired custody and control of the lunatic's property lying within this state."

But there are cases in which it was conceded by one party that jurisdiction to appoint a guardian of an estate might rest on a different basis than a proceeding for the appointment of a guardian of the person, although both proceedings require an adjudication of insanity, such as McCormack v. Blaine, ... Ill. ..., 178 N. E. 195. And there are cases which hold that there is a difference in the service required where the guardianship is to conserve and not for the disposition of property, such as in Re Ryan, 40 N. Y. S. (2d) 592, and in Re Sall, ... Wash. ..., 110 Pac. 32.

And there are cases such as Wallace v. Tinney, ... Iowa ..., 122 N. W. 936, which is at variance with later decisions in the same state such as Raher v. Raher, ... Iowa ..., 129 N. W. 94.

As said in 77 A. L. R. 1228, "there is comparatively little authority as to the general or constitutional validity of proceedings to have a person declared insane and to appoint a guardian or committee of his person or property based on constructive or substituted service of process." And it is further apparent from the foregoing and from the annotations in 23 A. L. R. 594 and 126 A. L. R. 671 that there is no uniformity as to the notice required by the courts in proceedings to determine sanity and for the appointment of a guardian.

An adjudication of insanity effects grave and serious consequences as stated in the often quoted case of Evans v. Johnson, 19 S. E. 623 (Sup. Ct. W. Va.):

"It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, his person, his liberty, and stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made short of conviction of infamous crime. Will it be said, in answer to this, that he is insane, and that notice to an insane man will do him no good?

"The response is that his insanity is the very question to be tried, and he the only party interested in the issue. Often, if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice."

And this court in Minnesota v. Probate Court, 309 U. S. 271, 276, has said:

"We fully recognize the danger of a deprivation of due process of proceedings dealing with persons charged with insanity, or as here, with a psychopathic person * * * and the special importance of maintaining the basic interests of liberty in a class of cases where the law, though 'fair on its face and impartial in appearance,' may be open to serious abuses in administration, and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceeding."

So that in this case, where the Supreme Court of Texas has held contrary to the decision of this court in Pennoyer v. Neff, and in view of the confusion which exists in the law generally, it is respectfully submitted that this court

should grant the Writ of Certiorari and should settle the law consistently with its prior decision in Pennoyer v. Neff.

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APPENDIX.

No. A-1330.

In the Supreme Court of Texas.

Hugh Henderson,
Petitioner,
v.
Shell Oil Company et al.,
Respondent.
} From Clay County, Second District.

OPINION.

A very full statement of this case is made in the opinion of the Court of Civil Appeals, for which see 202 S. W. 2d 492. We have concluded that each question of law presented to that court was correctly decided by it, but in the light of the contentions presented here in the application, which reflects much diligence and earnestness, we have concluded to write on what we conceive to be the principal questions before us. Our statement, in the main, will be in the language of the opinion of the Court of Civil Appeals, but in a somewhat condensed form.

At all times mentioned in this opinion Hugh Henderson has been a person of unsound mind and has resided in the State of Missouri. Some time prior to 1918 he acquired a 220-acre tract of land in Clay County, Texas. In the year last mentioned the County Court of Clay County appointed his brother, M. L. Henderson, a resident of that county, as guardian of his estate. In 1939 Shell Oil Company proposed to the guardian to purchase an oil and gas lease on his ward's land. Shell's attorneys recommended that a new order of appointment be obtained, the validity of the former order being questioned on the ground that

it did not contain an express adjudication that Hugh Henderson was of unsound mind. The recommendation was adopted, and M. L. Henderson again made application for appointment as guardian of that estate, and his application was granted. Notice of the application was given by posting. In addition, some sort of non-resident notice was served on Hugh Henderson in Missouri. Shortly after the 1939 appointment, the guardian, under order of the court, executed an oil and gas lease on Hugh Henderson's land in favor of Shell, and later executed a conveyance of one-half of the minerals in said land to the same company. Thereafter Shell drilled wells on the land, and has produced a large amount of oil therefrom. In 1943 Hugh Henderson, by next friend, filed an application for writ of certiorari in the District Court of Clay County, seeking a revision of the orders of 1918 and 1939 appointing M. L. Henderson guardian of his estate, and an annulment of the orders authorizing the oil and gas lease and the mineral deed. The case reached this Court on a contest over the question of who should act as next friend (143 Tex. 142, 182 S. W. 2d 994), but no question was decided on that appeal which has any relevancy to the questions now before the Court. In a non-jury trial of the certiorari proceedings in the district court, judgment was rendered affirming the orders of the probate court and denying Henderson any relief. That judgment was affirmed by the Court of Civil Appeals. 202 S. W. 2d 492.

We granted the application for writ of error for the purpose, primarily, of reviewing the holding of the Court of Civil Appeals with respect to the question of whether the orders of the county court authorizing the execution of the lease and the mineral deed were invalid because of the conflict of loyalties on the part of the attorney representing the guardian in those proceedings. Before discussing that question, we shall write briefly on the ques-

tion of the jurisdiction of the probate court to enter the order of 1939 appointing M. L. Henderson guardian of the estate of Hugh Henderson. We find it unnecessary to consider whether or not the order of 1918 was valid, since the lease and deed under attack were executed after the order of 1939 was entered.

Article 4132, R. C. S., authorizes probate courts to appoint guardians for nonresident persons of unsound mind, and Article 4123, R. C. S., authorizes those courts to determine that the person for whom a guardian is to be appointed is of unsound mind. A State has the power to control the property of nonresident minors and persons of unsound mind situated within its borders, through guardians appointed for their estates. Hoyt v. Sprague, 103 U. S. 613; Neal v. Bartleson, 65 Tex. 478. The validity of an order appointing a guardian of the estate of a person of unsound mind does not depend upon a prior legal adjudication of insanity. The fact of insanity may be established upon the hearing of the application for the appointment of the guardian. Bearden v. The Texas Company (Com. App.), 60 S. W. 2d 1031. Nor is it necessary that a prior adjudication of insanity in the state of the residence of the person of unsound mind be shown. Chaloner v. Sherman, 242 U. S. 455, 61 L. Ed. 427.

Article 4116, R. C. S., provides that a minor fourteen years of age or over shall be personally served with citation to appear and answer an application for the appointment of a guardian of him or of his estate. Article 4274 provides that each provision in the title relating to guardianships of persons and estates of minors shall apply to guardianships of persons of unsound mind "in so far as the same are applicable." Petitioner takes the position that the Article last cited makes the Article first cited applicable to guardianship proceedings for insane persons. We are not in agreement with this view. Article 4116 is

grounded upon the presumption that by the time the minor reaches the age of fourteen years he will have acquired some discretion and be capable of making a choice of guardian. No such presumption obtains in the case of a person of unsound mind. His discretion does not grow with the years. Article 4116 is, therefore, not applicable to him.

It was held in Storey v. Storey (Civ. App.), 105 S. W. 2d 370 (writ of error refused), that personal service of citation on a person of unsound mind was ineffective to confer jurisdiction on a county court to appoint a guardian for such a person and that notice by posting provided by Articles 4115 and 4115 was mandatory. That requirement was met in this case. Prior to 1941 (47th Leg., p. 867, ch. 541) there was no statute in Texas authorizing non-resident notice in a guardianship proceeding for a person of unsound mind. Our conclusion is that the Court of Civil Appeals correctly decided that the County Court of Clay County was acting within its jurisdiction in making the appointment of M. L. Henderson as guardian of the estate of Hugh Henderson in 1939.

It is our further view that due process within the meaning of the 14th Amendment to the Constitution of the United States was observed in the proceeding. Jones v. Prairie Oil Co., 273 U. S. 195; McKinley v. Salter (Civ. App.), 136 S. W. 2d 615 (writ dismissed, correct judgment). Such a proceeding is one in rem or quasi in rem. McCormick v. Blaine, 178 N. E. 195, 77 A. L. R. 1215; Re Sall, 59 Wash. 539, 140 Am. St. Rep. 885; Wallace v. Tinney (Iowa), 122 N. W. 936. In a proceeding of that nature the court may acquire jurisdiction by means of substituted or constructive service. Pennoyer v. Neff, 95 U. S. 714; Re Sall, supra; Case note 77 A. L. R. 1227. A contrary holding would have the effect of depriving the

courts of this State of control over lands situated within its borders.

We come now to consider the question upon which the application for writ of error was granted. Petitioner challenges the validity of the order authorizing the execution of the oil and gas lease to Shell and insists that it should be set aside and the lease annulled on the ground that such guardianship proceedings, though purporting to be in behalf and for the benefit of Hugh Henderson, were actually conducted in behalf of Shell. The primary basis for this contention is that the attorney who represented the guardian, and therefore the interest of Hugh Henderson, in those proceedings was at that time a broker employed by Shell on a contingent basis to procure for it an oil and gas lease on Hugh Henderson's land, and he was actually paid a commission by Shell for procuring such lease at the conclusion of the proceedings. The district court, after a full hearing, refused to vacate the order and annul the lease, and its judgment was affirmed by the Court of Civil Appeals. We should therefore view the evidence in the light most favorable to the respondent. Our statement of the facts bearing upon this question will be substantially in the language of the opinion of the Court of Civil Appeals.

In 1939 Shell carried on some explorations in the area in which Hugh Henderson's land is located. What information was derived from such explorations is not shown in the record, but as a result thereof representatives of Shell engaged Mr. Frank Bunting, an attorney who resided in Clay County and who was related by marriage to the Henderson family, to assist its leasing agent in obtaining leases on a block of land in that vicinity. It was agreed that for his services Mr. Bunting was to be paid a brokerage fee of 50¢ per acre on all leases which might be

obtained in that block. Thereafter, Mr. Bunting informed the guardian, M. L. Henderson, and other members of the Henderson family of the offer made by Shell to him. With knowledge of that fact, leases on lands belonging to other members of the Henderson family were obtained and the guardian agreed to lease the ward's land to Shell on the same terms, subject to the approval of the county court. With full knowledge conveyed to the guardian by Mr. Bunting of the facts with respect to the brokerage fee which he expected to receive from Shell, the guardian suggested to Mr. Bunting that he act as attorney for him, the guardian, in conducting the proceedings in the probate court. Mr. Bunting again pointed out to the guardian that he expected to receive a brokerage fee from Shell, but the guardian, nevertheless, requested Mr. Bunting to act as his attorney in the matter. A part of the general arrangement was that Shell would pay the costs of the probate proceedings, including the attorney's fee. There was nothing concealed about the transaction; in fact, it was voluntarily entered into with full knowledge of all the facts. Pursuant to the agreement, Mr. Bunting conducted the proceedings and was paid an attorney's fee for such services by Shell, as well as the brokerage fee which had theretofore been agreed upon. The proceedings were not, strictly speaking, adversary. The guardian received the same bonus per acre for the lease as other landowners in the vicinity. There is no showing of fraud or damage. Notwithstanding this, we are asked to declare the proceedings and the sale of the lease thereunder invalid on the ground that the attorney was subject to divided loyalties. It is a sound public policy which exacts utmost fidelity of attorneys, and that policy should not be weakened by the whittling down process or the adding of numerous exceptions to the rules calling for its application. On the other hand, loyalty to that policy does not require the setting aside of court orders and the destruction of titles to valu-

able property when, as in this case, the transactions are open and above board.

Petitioner places much emphasis on the fact that it appears that the county court was not informed of the fact that Mr. Bunting was being paid by Shell, but the district court before which the case was tried de novo had full knowledge of all the facts, and after a full hearing upheld the validity of the entire transaction. The Court of Civil Appeals, in a well-considered opinion, has found no grounds upon which to invalidate these proceedings, and we have concluded that a sound public policy does not require this court to do so.

We are unable to sustain any of the assignments brought forward in the application for writ of error, and it is accordingly ordered that the judgment of the Court of Civil Appeals, affirming that of the trial court, be affirmed.

J. E. Hickman,
Chief Justice.

Opinion delivered 11 Feb. 1948.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Hugh Henderson et al.,
Appellants,
vs.
Shell Oil Company, Inc., et al.,
Appellees.
No. 14,826.

From the District Court of Clay County.

OPINION.

Since prior to the year 1918 Hugh Henderson has owned a 220 acre tract of land in Clay County, Texas. During all of such time Henderson has been a person of unsound mind, and during all of such time he has resided in the State of Missouri. In 1918 the County Court of Clay County entered an order appointing M. L. Henderson, a brother of Hugh Henderson, as guardian of the latter's estate. M. L. Henderson resided in Clay County. In 1939 M. L. Henderson again applied to the same court for letters of guardianship, and again an order was entered appointing him guardian of such estate. Shortly afterwards the guardian, under order of the court, executed an oil and gas lease on said land in favor of the appellee Shell Oil Company, and also executed what we may call a conveyance of half the minerals in said land to the same company. Shell drilled wells on the land, and has produced a large amount of oil therefrom.

In 1943 Hugh Henderson, by his next friend, filed an application for writ of certiorari in the District Court of Clay County, seeking a review and revision of the 1918 and the 1939 orders of the county court appointing a guardian, and the orders authorizing the oil and gas lease and the conveyance of half the minerals to Shell Oil Com-

pany. Art. 932, Revised Civil Statutes, and Rules 344 to 351, inclusive, Texas Rules of Civil Procedure. A contest over the question of who should act as next friend for Henderson was carried to the Supreme Court. Henderson v. Shell Oil Co., 143 Tex. 142, 182 S. W. 2d 994.

A non-jury trial of the certiorari proceeding in the district court resulted in a judgment which in effect confirmed the orders of the probate court and denied Henderson any relief. He has appealed, presenting five points of error. Appellees Shell Oil Company and the present guardian (M. L. Henderson having died during the pendency of the suit) have filed separate briefs, in each of which it is contended that the certiorari proceeding must be treated as a collateral attack on the probate proceedings because of lack of necessary parties. Since we have concluded that the probate orders are valid even as against a direct attack, we shall not undertake a decision of the question just mentioned, but for the purpose of this opinion shall treat the certiorari proceeding as a direct attack on the orders of the county court.

In 1918 M. L. Henderson made application to the County Court of Clay County for appointment as guardian of the estate of Hugh Henderson. In 1939 Shell Oil Company proposed to the guardian to purchase an oil and gas lease on the ward's land. Shell's attorneys recommended that a new order of appointment be obtained, on the ground, according to the testimony of one witness, that the 1918 order did not contain an express adjudication that Henderson was of unsound mind. M. L. Henderson again made application for appointment as guardian of said estate, and again was appointed as such. Notice of the 1918 application was given by publication in a local newspaper. Notice of the 1939 application was given by posting, and in addition a sort of nonresident notice was served on Hugh Henderson in Missouri. Both appointments are attacked on several grounds.

First, it is contended that the Texas court had no jurisdiction to adjudge a resident of another state insane and to appoint a guardian of his estate. We overrule this contention. There is language in the opinion in Redmon v. Leach, Tex. Civ. App., 130 S. W. 2d 873, writ dismissed, correct judgment, which supports appellant's contention. To the contrary, however, is the holding in In re Burges' Estate, Tex. Civ. App., 148 S. W. 2d 903. Article 4132, Revised Civil Statutes, provides among other things that a guardianship of the estate of a nonresident minor or person of unsound mind may be granted when such person has an estate located within the State of Texas and it is made to appear that a necessity exists for such guardianship. Redmon v. Leach declares that Art. 4132 is unconstitutional. In re Burges' Estate cites Redmon v. Leach, but refuses to follow the rule there announced, and declares that Art. 4132 is not unconstitutional, citing Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585, where the Supreme Court of the United States held that "there can be no doubt that the legislature of Rhode Island, where the property was situate, had power, first, to pass laws for the appointment of guardians of the property of nonresident infants, situate in that State; and secondly, it had power to prescribe the manner in which guardians shall perform their duties as regards the care, management, investment, and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the State."

Appellant argues that Missouri alone had jurisdiction to declare the status of Hugh Henderson, whether sane or insane. But it is to be remembered that Texas, and not Missouri, had jurisdiction over the property of Hugh Henderson which was located in Texas. Without a guardianship in Texas, there would have been no person competent to handle or dispose of the Texas property. Neither Hugh Henderson, nor a guardian appointed by another state,

could have sold the Texas land or leased it for oil and gas development. As said in Erwin v. Holliday, 131 Tex. 69, 112 S. W. 2d 177, "It is now well settled that the states possess exclusive jurisdiction over property situated within their territorial limits." To quote again from the same opinion, "Of course, in the accomplishment of such purposes, the courts cannot act directly upon the person of the nonresident owner or claimant, but upon the title or the property itself." The case just cited does not involve property belonging to an insane person, but the basic rule is the same, whether the nonresident property owner be sane or insane. In Neal v. Bartleson, 65 Tex. 478, our Supreme Court held that a Texas court had jurisdiction to appoint a guardian of the Texas estate of nonresident minors, even where there was no statute expressly authorizing such an appointment. The opinion declares: "In England and America, however the rule may be elsewhere, it is held, that the courts of the country in which property of a minor may be, to whom is confided the general power to appoint guardians and to administer minor's estates, have the power to appoint guardians of the estates of minors resident elsewhere and to control their estates." In Bouldin v. Miller, 87 Tex. 359, 28 S. W. 940, the minors were residents of California. It was contended that the Texas probate court had no authority to appoint a guardian or to order sale of land situated in Texas which belonged to the minors. The Supreme Court pointed out that the minors could dispose of their Texas land only through proceedings in a Texas probate court. In 44 C. J. S., p. 60, it is said: "Guardianship of property of an insane person may be authorized where his residence and the property are within the territorial jurisdiction of the court; and, ordinarily, such a guardianship may be had although the insane person is a nonresident." A proceeding to commit an insane person, or to appoint a guardian of his person, is a proceeding in

personam, but a proceeding to appoint a guardian of the estate of a nonresident is primarily a proceeding in rem, jurisdiction of which depends not on the residence of the insane person but on the location of the property.

Appellant argues that a different rule would apply to guardianship of the estate of an insane person than would apply to guardianship of the estate of a minor. We do not see that there would be such a difference. In either case the court has authority to act because the property lies within the jurisdiction of the court, and because the status of its owner is such that the court is empowered under the law to assume control of the property. As said above, Texas has exclusive jurisdiction of the land in Clay County. Through its constitution, Art. 5, Section 16, Texas has vested in the county court jurisdiction of that land if its owner is a minor or a person of unsound mind, whether the owner resides within or without Texas. Neal v. Bartleson, supra. It is elemental that the Texas court, and the Texas court alone, has jurisdiction to inquire into and find the facts supporting its jurisdiction. A Texas court might in a proper case give full faith and credit to a judgment of a Missouri court adjudging Hugh Henderson to be an insane person, but still the ultimate finding as to insanity would be a burden resting on the Texas court, when the question was whether the owner of the Texas property occupied a status that would authorize the Texas court to assume control of the property. The adjudication of the Texas court as to minority, or as to insanity, would not be in the nature of a proceeding in personam, but would be a step in the determination of the question whether the property in Texas was subject to the jurisdiction and control of the court.

There is much argument in the briefs about whether there is or is not sufficient proof in the record of an adjudication of insanity in Missouri prior to the 1918 guardianship appointment by the Clay County Court. As we see

it, it is not material here whether there was or was not such an adjudication in Missouri. A rule that would require the Texas court to refrain from assuming control of the property lying within its jurisdiction until a Missouri court had declared the property owner insane would impair, or could even defeat entirely, the exercise of jurisdiction by the Texas court. Missouri might never take any action with respect to the question of Henderson's insanity, in which case, under the views entertained by appellant, the result would be that Texas would be left powerless to exercise the exclusive jurisdiction which it has over property situated within its territorial limits.

Appellant suggests that Texas would have jurisdiction only to maintain an ancillary guardianship, following an insanity proceeding in Missouri. This contention is answered in Neal v. Bartleson, 65 Tex. 478, where it is said that "the exercise of the power to appoint here the qualified nonresident guardian is the exercise simply of the power of the court to appoint guardians of the estates of such persons."

Appellant also argues that Article 4132 did not before it was amended in 1921 provide for a determination of insanity in what we might term an ordinary guardianship proceeding. Since 1876 the statute has authorized the appointment of a guardian of the estate of a nonresident minor or insane person. Even without that statute, under the principles announced in Neal v. Bartleson, 65 Tex. 478, cited supra, the court would have had jurisdiction to appoint the guardian. Authority to make the guardianship appointment would clearly imply authority to find the fact necessary to support jurisdiction of the county court of the estate in question, to-wit, that the nonresident owner was a minor or a person of unsound mind.

Appellant next argues that both guardianship appointments were invalid for lack of personal service on Hugh

Henderson. The opinion in Redmon v. Leach, Tex. Civ. App., 130 S. W. 2d 873, cited supra, so holds, and there is certain dicta in the opinion in Bearden v. Texas Co., Tex. Com. App., 60 S. W. 2d 1031, which might indicate a rule that an insane person over 14 years of age must be served personally when application is made for appointment of a guardian. Redmon v. Leach involved an appointment of a guardian of a nonresident, but in Bearden v. Texas Co., the insane person resided in Texas. Art. 4274 provides:

> "Each provision of this title relating to the guardianship of the persons and estates of minors shall apply to the guardianship of the persons and estates of persons of unsound mind, and habitual drunkards, in so far as the same are applicable."

Art. 4114 provides for issuance by the clerk of notice of an application for guardianship of a minor. Art. 4115 provides that the notice shall be posted for ten days. Art. 4116 provides that minors over fourteen years of age shall be personally served with citation. It is appellant's theory that Art. 4116, by reason of Art. 4274, is applicable to guardianships of insane persons, and that insane persons over fourteen years of age must be personally served with citation.

In the absence of a statute providing for nonresident notice on a nonresident minor or person of unsound mind, we do not see that proper notice could have been given under the statutes in force at the times of the appointments here involved, except by publication in a local newspaper in 1918, or by posting in 1939, unless the nonresident had been personally served within the borders of the state. "The life or force of a process in personam is limited to the territorial jurisdiction of the court that issued it, not beyond, and when a court or its officers seek to expand the reach of process beyond this, it is a nullity and judicial action in personam against a nonresident may not be

predicated thereon." 42 Am. Jur., p. 43. "Personal service on a nonresident defendant, outside the jurisdiction of the court, does not suffice to give the court jurisdiction over his person. When the process of a state court crosses the state line, it loses its vitality as an instrument on which a personal judgment can be rendered against a nonresident." Id. Nonresident notice is in legal effect substituted or constructive service. Neither in 1918 nor in 1939 was there any statute in Texas authorizing nonresident notice in a guardianship proceeding. While Erwin v Holliday, 131 Tex. 69, 112 S. W. 2d 177, cited supra, did not involve a guardianship proceeding, it is authority for the proposition that nonresident notice cannot be employed as a method of service on a nonresident in the absence of a statute providing for its use in the particular proceeding.

The basic error in appellant's contentions, both as to the jurisdiction of the Texas court to appoint a guardian and as to the question of personal service on Hugh Henderson, is the failure to treat the guardianship as a proceeding in rem rather than as a proceeding in personam. The primary purpose of the guardianship proceeding was not to have the County Court of Clay County adjudge the status of the nonresident Hugh Henderson, but to have that court exercise control of property lying within its jurisdiction.

Appellant's brief contains a suggestion that the 1918 appointment is invalid for failure to contain an express adjudication that Henderson was insane. The application for guardianship avers that Hugh Henderson is a person of unsound mind, and the order appointing a guardian recites that application for appointment of guardian of Hugh Henderson, a person of unsound mind, came on to be heard, and orders, adjudges and decrees, to quote from the order, "that said M. L. Henderson be and he is hereby

appointed guardian of the estate of Hugh Henderson, lunatic . . .'' Bearing in mind what is said above, we hold that the order of the court amounts to an express finding and adjudication by the court that Henderson was a person of unsound mind.

It is also contended that the two appointments are invalid because there was not a trial to a jury, and because no guardian ad litem was appointed by the court to represent Hugh Henderson. The authorities cited by appellant on the question of jury trial are not applicable to the proceedings now under review, and we find no authority to support the proposition that the orders were invalid for failure to appoint a guardian ad litem. Proceedings for the appointment of a guardian are not adversary in character. McKinley v. Salter, Tex. Civ. App., 136 S. W. 2d 615, writ dismissed, correct judgment.

Appellant's first point of error reads as follows:

> ''The oil and gas lease made to Shell Oil Company by M. L. Henderson as guardian, and the order of and proceedings in the County Court upon which it was based, are invalid and should be set aside, because the undisputed evidence and admissions of Shell show that such guardianship proceedings, though purporting to be in behalf of and for the benefit of Hugh Henderson, were actually conducted in behalf of Shell Oil Company, and that without disclosure to the County Court the attorney who represented the guardian and therefore the interests of Hugh Henderson in said proceedings was then and there a broker in the pay of Shell Oil Company, employed by it on a contingent basis to procure for it an oil and gas lease on Hugh Henderson's land and at the conclusion of the proceedings was paid a commission by Shell for procuring said lease as well as attorney's fees for conducting said proceedings, and the Court

erred in failing and refusing to vacate and cancel said oil and gas lease and said order and proceedings upon which it was based."

The judgment appealed from upholds the guardianship proceedings. Disputed fact questions must be resolved in favor of appellees. Bearing this in mind, it appears from the evidence that in 1939 Shell Oil Company made some seismographic exploration in the area where Hugh Henderson's land was located. What information such exploration disclosed is not shown by the record, nor was it disclosed to the guardian nor to the county court when application was made to lease the land to Shell. Shell representatives got in touch with Mr. Frank Bunting, an attorney in Clay County who was related by marriage to the members of the Henderson family. They, together with Hugh Henderson, owned a considerable amount of land in the area. Shell engaged Mr. Bunting to obtain leases on such land, if it could be done, and authorized him to pay $5.00 per acre for the leases. Shell also agreed to pay him a brokerage fee of fifty cents per acre on all leases which he might obtain. Mr. Bunting approached M. L. Henderson and other members of the family, and told them of the offer made by Shell for leases. Leases were obtained on lands belonging to other members of the family, and the guardian agreed to lease the ward's land to Shell, subject to approval of the county court. When Mr. Bunting first approached the guardian, and others of his relatives as well, he advised them that he would receive a brokerage fee from Shell on all leases that he might obtain. Discussion arose between the guardian and Mr. Bunting concerning the handling of the proceedings in the probate court, and the guardian suggested that Mr. Bunting act as attorney for the guardian in presenting the matter to the court. Mr. Bunting again pointed out that he expected to receive a brokerage fee from Shell, but nevertheless it was agreed between Mr. Bunting and

the guardian that the former should act as attorney in presenting the lease matter to the county court. It was also agreed that Shell would pay all the costs of the probate proceeding, including the attorney's fee. Pursuant to the arrangement made, Mr. Bunting represented the guardian in the probate court proceedings, and was paid an attorney's fee for such services by Shell, and was also paid the brokerage fee by Shell which had theretofore been agreed upon. The various applications, orders, etc., used in the probate proceedings were first prepared by Shell attorneys, and then sent to Mr. Bunting, who made changes in some of the papers, but not in others.

Appellant contends that the 1939 order of appointment, and especially the lease to Shell, must be stricken down because Mr. Bunting, while acting in the employ of Shell, also acted as attorney for the guardian in the probate proceedings. It is argued that Mr. Bunting could not lawfully represent both buyer and seller, especially in a case where the seller was a guardian who first had to apply to the court for authority to make the sale. It is argued that the evidence shows without dispute that the guardianship proceedings were conducted as an enterprise of Shell Oil Company, and for its benefit, and not for the benefit of the ward's estate. It is contended that the law provides that the guardian may have an attorney, and that if he does, the attorney must not represent conflicting interests. While a great many decisions and statements of text writers are cited by appellant, none of them is in point with respect to the facts of this case, except in so far as they declare general principles of law. Some of them involve claims of attorneys for fees, where they represented conflicting interests without notice to the parties of such conflict. Others involve the authority of attorneys to bind clients in such situations. Many of the cases involve the general rule that sales will not be upheld where the guardian, trustee, or other representative purchases prop-

erty of the estate in his charge. Other cases involve sales by fiduciary representatives to wives, law partners, or business associates of the fiduciary. In the kinds of cases just mentioned, and in many other kinds of cases, courts have refused to uphold sales, or to enforce contracts or other rights, on the ground of public policy. In a suit on a gambling contract, for instance, while a court may say that there is no contract, the real basis for refusal to enforce the contract is that the court believes that it would be unsound public policy to enforce it. In the cases of purchases of property by representatives from estates in their charge, the courts in the most positive language have condemned such purchases, and have employed even fictional devices to annul them. They do so on the ground that it is against public policy to permit such purchases, or sales, and that inquiry will not be made into the question of the fairness of the sale or the adequacy of the purchase price. While the rules in this respect are so well known that it is not necessary to cite the host of decisions declaring them, an outstanding opinion is that of the Supreme Court of the United States, in Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076. Our problem is to determine whether such rules are applicable to the facts before us. If the rules applicable to purchases by fiduciaries from the estates in their care, or to sales by fiduciaries to wives, law partners, and business associates, govern the case before us, then we will not consider the adequacy of the price, nor will we inquire whether the sale was advantageous to the estate or not. Nor would it be material whether the question was raised on direct appeal from the county court, or by certiorari. This is true, because the courts will go far in striking down sales made under such circumstances. But as we analyze the facts here presented, the case does not come within those rules.

The lease was not made to a guardian or to one so closely connected with him that the conveyance will be

held invalid under the rules just discussed. Nor is it a case where the guardian received a fee or other compensation from the purchaser for making the sale. The courts in those cases will hasten to declare the sale invalid unless the rights of innocent purchasers are involved. There is no claim that Mr. Bunting made any misrepresentation, of fact or of law, to the guardian or to the county court in the purchase of the lease or in the presentation of the matter to the court. There is no claim that the written lease, or any of the court proceedings, fail to contain the agreements made between the guardian and the lessee. There is no suggstion, either by way of proof or by contention by appellant, that the application to make the lease, the order confirming it, or the lease itself, would have contained different language if prepared by any other attorney. Mr. Bunting's role as attorney for the guardian, under the facts shown by the record, cannot be so magnified as to bring the case within the classes of cases above enumerated. Had the guardian been paid a brokerage fee by Shell for obtaining the lease, we would have a completely different case, and one which any court would quickly and sternly decide. But that did not happen.

Appellant cites cases where there was a conflict of interests between a minor and the person representing him as next friend in a suit, but those cases are not like the one before us. Nor is Slay v. Burnett Trust, 143 Tex. 621, 187 S. W. 2d 377, in point on the facts. In that case the conduct charged as fraudulent was that of the trustee himself and his law partner, which brought the case within the rules above discussed. Many statements can be found in opinions of appellate courts to the general effect that it is improper for an attorney to represent conflicting interests, but those statements must in each instance be read in the light of the facts involved in the particular case in order to arrive at a true interpretation of them.

In certain kinds of cases, as in sales of estate property to a fiduciary, the court may declare the sale improper, and set it aside, without respect to the question of damage to the estate. In other kinds of cases, as where fraudulent misrepresentations are made by the purchaser to the guardian, the court might declare that fraud had been committed, and yet decline to set the sale aside in the absence of a showing of damage to the estate. The distinction in the two kinds of cases, and in the attitudes of the courts toward them, lies in the fact that in the first the court strikes down the sale as a matter of public policy, and by way of issuing warning to all fiduciaries that they must not trade and traffic in the property of the trust estate, while in the other the object of the court is to afford redress for a wrong committed.

Appellant argues that full disclosure was not made to the guardian and to the court about the seismographic exploration which Shell had made, but we know of no rule of law requiring the purchaser of oil leases to disclose to the seller information that the purchaser may have concerning the land which the seller may not have, in the absence of a fiduciary or confidential relationship between the buyer and the seller. It is argued that it was improper not to disclose to the county court the fact that the guardian's attorney had a personal interest in the transaction by way of a brokerage fee to be paid him by the Shell. This contention has caused us some concern, but we have concluded that the most effect which could be given it would be to say that it would be ground for setting aside the sale if it were reasonably shown that such non-disclosure caused the court to approve a sale at an inadequate price. It would not bring the case within the rules declaring sales invalid for reasons of public policy without regard to the question of damage.

Appellant attacks the conveyance of half the minerals made by the guardian on the theory that (1) the sale was

made solely under Article 4195a, which statute does not authorize the sale of minerals, royalties, the right to make future leases, and future bonuses, (2) no facts existed authorizing the sale under Article 4195a, and (3) the sale was made without any authority of law.

Article 4195a, Vern. Tex. Civ. St., provides that whenever the estate of a ward consists in part of real estate, and any part or parcel of such real estate produces no revenue or does not produce sufficient revenue to make a fair return upon the value of such part or parcel of real estate, and the guardian does not deem it advisable or advantageous to improve such part or parcel of real estate, and believes that the sale thereof and investment of the money derived therefrom would be to the best interest of said estate under all the circumstances, he may apply to sell it and the court may order it sold. No oil had been discovered on or produced from this land at the time of the sale of half the minerals. The guardian had from time to time received small amounts of money from grass leases, and from sale of oil and gas leases (which had expired prior to the time the Shell lease was made). He received $2200.00 from the sale of the lease to the Shell. It was shortly after this that he made the mineral conveyance to the Shell. The guardian's application to sell half the mineral interest in the land alleges facts substantially the same as those set out in Article 4195a, and in ordering the sale the county court found that such facts existed. The district court obviously found the same facts, in refusing to set aside the probate order. It cannot be said that there is no evidence to support the finding thus necessarily to be implied.

Appellant argues, but cites no authority in support of the argument, that Article 4195a "does not authorize the sale of minerals, royalties, the right to make future oil and gas leases and future leases." Article 4195a author-

izes the sale of unproductive "real estate". This clearly warrants a sale of the minerals or an interest therein separate and apart from the surface. See Avis v. First Nat. Bank, 141 Tex. 489, 174 S. W. 2d 255, and authorities therein cited.

All that is said above concerning Mr. Bunting's connection with the making of the lease is applicable to the sale of the mineral interest.

Many other questions are discussed in the briefs and written arguments of the parties, comprising more than six hundred pages, but we have discussed the questions which we consider necessary to a proper disposition of the appeal.

Finding no error, we affirm the judgment of the trial court.

Atwood McDonald,
Chief Justice.